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July 18, 1997

VIA HAND-DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RECEIVED

JUL 18 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex Parte Presentation in CS Docket No. 95-184

Dear Mr. Caton:

Pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1995), this is to provide an original and one copy of a notice of *ex parte* presentations made in the above-referenced rulemaking proceeding on behalf of RCN Telecom Services, Inc. ("RCN") by Michael J. Mahoney, W. James Mac Naughton, and the undersigned. On July 17, 1997, these RCN representatives met with Gretchen Rubin, Counsel to the Chairman, Anita L. Wallgren, Legal Advisor to Commissioner Ness, Marsha J. MacBride, Legal Advisor to Commissioner Quello, Meredith Jones, Chief of the Cable Services Bureau, John E. Logan, Deputy Chief of the Cable Services Bureau, JoAnn Lucanik, Chief of the Policy and Rules Division of the Cable Services Bureau, Rick C. Chesson, Deputy Chief of the Policy and Rules Division of the Cable Services Bureau, and Lynn M. Crakes, Attorney-Advisor, to discuss issues and positions raised by a number of parties to this proceeding and addressed in the filings made by RCN in the docket.

RCN reiterated its position that moving the cable inside wiring's current demarcation point of 12 inches outside of the subscriber's premises to a more accessible and common area is the most efficient and effective way to ensure true competition in the video programming market. Should the Commission determine not to move the current demarcation point, however, RCN discussed with Commission staff the proposal submitted by the Independent Cable & Telecommunications Association ("ICTA") insofar as it relates to multiple dwelling unit ("MDU") buildings where there are more than one provider of video services. Specifically, RCN provided the Commission participants with photographs illustrating that the

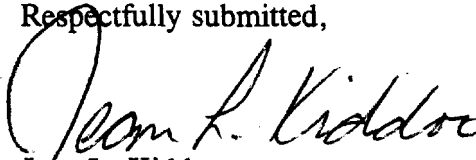
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demarcation point in MDU buildings may often be accessible only by a limited number of wires, and that several clarifications and refinements of the ICTA proposal are therefore essential in order to assure that the demarcation points are accessible by all providers offering service in an MDU building where competition exists. Absent such explicit rulings by the Commission, the incumbent provider in a building could easily block access by its competitor(s) to the demarcation points of individual units, thereby eliminating competition in the building. The photographs provided to the Commission participants, and an outline of RCN's presentation, are attached hereto.

Should any further information be required with respect to this *ex parte* notice, please do not hesitate to contact the undersigned.

Respectfully submitted,



Jean L. Kiddoo
Kathy L. Cooper

Enclosures

cc: Gretchen Rubin, Counsel to the Chairman
Anita L. Wallgren, Legal Advisor to Commissioner Ness
Marsha J. MacBride, Legal Advisor to Commissioner Quello
Meredith Jones, Chief, Cable Services Bureau
John E. Logan, Deputy Chief, Cable Services Bureau
JoAnn Lucanik, Chief, Policy and Rules Division, Cable Services Bureau
Rick C. Chesson, Deputy Chief, Policy and Rules Division, Cable Services Bureau
Lynn M. Crakes, Attorney-Advisor, Cable Services Bureau
Mr. Michael J. Mahoney
W. James Mac Naughton, Esq.

**SUMMARY OF RCN CABLE EX PARTE PRESENTATION 7/17/97
CS DOCKET NO. 95-184 (INSIDE WIRE)**

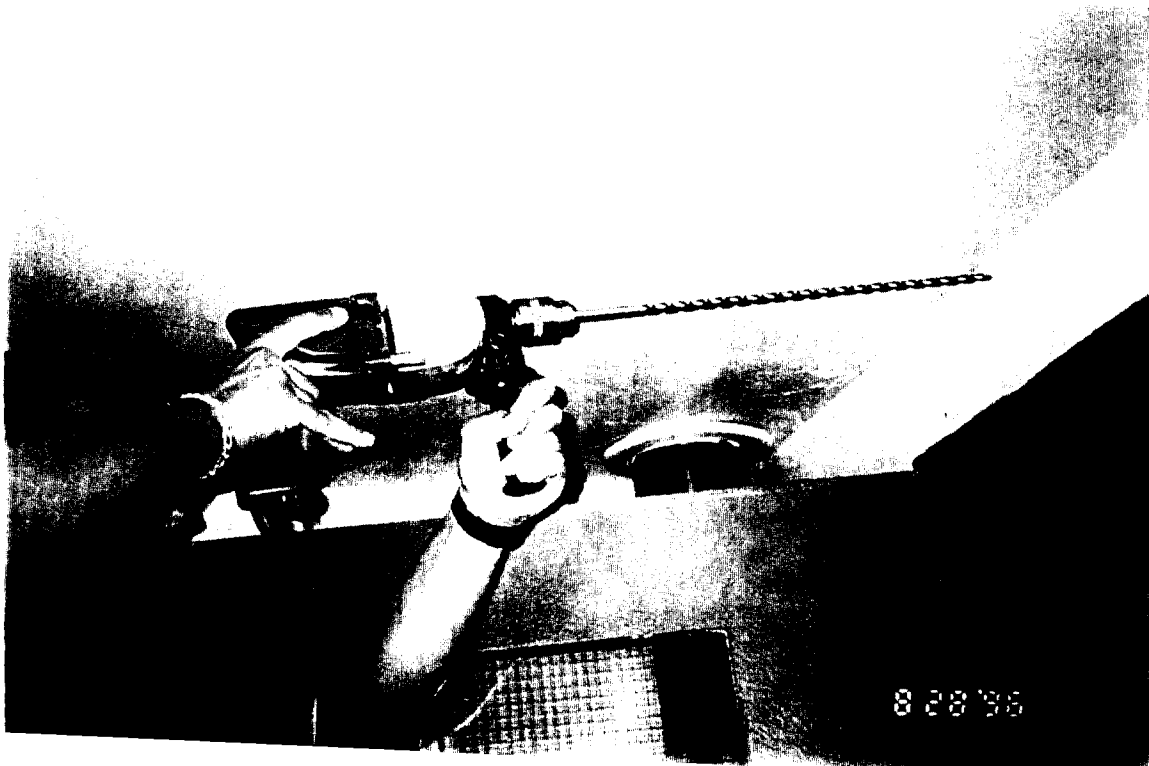
1. The Problem - The Inaccessible Demarcation Point (see photographs)
 - a. The demarcation point is enclosed by conduit/molding; and
 - b. A second and independent conduit/molding system cannot reasonably be installed due to space constraints or aesthetics as determined by the building owner.
2. The Solution - Assure that access to the demarcation points in the building is available to all MVPDs permitted by the building owner to offer service in the building.
 - a. If space is available in the existing conduit/molding, the competitor may not be prohibited from using that space for its wires; or
 - b. If space is not available in the conduit/molding, and the demarcation point is otherwise inaccessible (as defined above), the incumbent provider occupying space needed by another provider to serve a subscriber must elect to sell, remove, or abandon unused drops:
 - i. The NPRM defines "drops" as a dedicated line running to the subscriber's premises. (NPRM at ¶7) The Commission must clarify that "drop" means the portion of the individual dedicated subscriber line between the demarcation point of the cable home wiring and the common or "feeder" lines;
 - ii. The sale price would be the same formula as cable home wiring;
 - iii. Common wire, drops or other equipment actually in use by the incumbent provider to deliver service to active subscribers would not subject to this requirement; and
 - iv. Upon notice that space is needed to access the demarcation point(s), the incumbent provider will have seven days to negotiate a sale of the existing drop(s) with the building owner. If the parties are unable to reach an agreement on the terms of a sale, the incumbent provider must, within seven days, either abandon and disconnect the drop(s) (without disabling them) or remove the wiring, and must notify the other provider of its election no later than the seventh day.
 - c. The "incumbent provider" includes all MVPDs offering service in the building who have wiring installed in conduit or molding.

3. Legal Issues

a. There is no taking of property

- i. The incumbent provider retains ownership and control of the drop
 - (1) The drop is movable personal property; and
 - (2) The drop is not real estate nor is it a "fixture" because it is never permanently affixed to anything.
- ii. All empty space inside the building (including empty space inside conduits, molding or other fixtures) belongs to the building owner in the first instance. *Loretto v. Teleprompter*. A cable operator has no right under common law to exclude anyone from *any* place in the building.
 - (a) The incumbent provider only acquires a property interest in the empty space of the building by express contract with the building owner or by operation of law under a state mandatory access statute;
 - (b) No state mandatory access law gives the incumbent title to space (either inside or outside the conduit/molding) the incumbent does not need or use; and
 - (c) The rule applies only in a voluntary overbuild where the building owner is not bound by an exclusive contract and is prepared to allow multiple MVPD's into the building. The incumbent therefore has no contract right to exclude competitors from empty space, including empty space inside conduits/molding.
 - (i) Whether and to what extent the building owner can, by contract, grant any MVPD *de facto* exclusivity by allowing the installation of conduits or molding dedicated exclusively for the use of an MVPD should be the subject of the further NPRM; and
 - (ii) An exclusive contract does not confer a protected property interest on the incumbent provider to exclude competitors from unused space in the building. *Nichols on Eminent Domain (3d Ed.)* at § 5.03[6][6][f][iv] ("A contract giving one public service corporation the exclusive privilege of maintaining its works upon a certain tract of land creates no property right that the law will recognize when enforcing the exercise of eminent domain over the same land in behalf of another corporation.")

Exhibit 2



Exhibit



